

## United States District Court

EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL LUKE ALLISON

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Case Number: 4:19-CR-309(06)

Judge Mazzant

### **MEMORANDUM OPINION & ORDER**

Pending before the Court is Defendant Michael Luke Allison's Motion for Expedited Relief and Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A), As Amended by the First Step Act (Dkt. #314). The Court, having considered the motion, the response, the record, and the applicable law, finds that the motion must be **DENIED**.

### **BACKGROUND**

On September 21, 2020 Defendant Michael Allison ("Allison") pleaded guilty to Conspiracy to Possess with the Intent to Manufacture and Distribute 500 Grams or More of a Mixture or Substance Containing a Detectable Amount of Methamphetamine or 50 Grams or More of Methamphetamine (actual) or 28 Grams or More of an Amount or a Mixture or Substance Containing a Detectable Amount of Cocaine, in violation of 21 U.S.C. § 846. The Court sentenced Allison to 60 months' imprisonment with a facility report date of January 7, 2022. He will serve his sentence at FCI Beaumont Low. As of this date, Allison has not yet reported to the facility.

Since his sentencing, Allison has contracted, and entered remission from, basal cell carcinoma. He underwent two surgeries in August 2021 to treat the cancer. Doctors believe these surgeries successfully excised the cancer, but Allison asserts the condition is one that has weakened his immune system and could easily return. This, Allison argues, in combination with the risk of contracting COVID-19, presents "extraordinary and compelling reasons" which warrant

a reduction in his sentence (Dkt. #314). The Government responded that (1) this consideration is not ripe for review because Allison is not yet an inmate; and (2) Allison has not shown a right to relief on the merits because his reasons for reduction are not “extraordinary and compelling” (Dkt. #318).

### LEGAL STANDARD

A judgment of conviction imposing a sentence of imprisonment “constitutes a final judgment and may not be modified by a district court except in limited circumstances.” *Dillon v. United States*, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. § 3582(b)); *see also* 18 U.S.C. § 3582(c). One such circumstance arises from 18 U.S.C. § 3582(c)(1)(A), the statute authorizing compassionate release and sentence reduction. Under § 3582(c)(1)(A), a district court may grant a sentence reduction if it finds: (1) a defendant “fully exhausted all administrative rights”; (2) “extraordinary and compelling reasons warrant such a reduction”; (3) “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission”; and (4) such a reduction is appropriate “after considering the factors set forth in § 3553(a) to the extent that they are applicable.” 18 U.S.C. § 3582(c)(1)(A).

The First Step Act of 2018 made the first major changes to compassionate release since its authorization in 1984. Pub. L. 115-391, 132 Stat. 5194. Procedurally, the First Step Act removed the Director of the BOP as the sole arbiter of compassionate release. Instead, the law enabled a defendant to move for compassionate release directly in district court after exhausting their administrative rights. 18 U.S.C. § 3582(c)(1)(A). Prior to this change, the BOP retained sole gatekeeping authority over compassionate release petitions. *United States v. Brooker*, 976 F.3d 228, 232 (2d Cir. 2020). This resulted in underuse and mismanagement.<sup>1</sup> *Id.* Through the First

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<sup>1</sup> In 2013, a report from the Office of the Inspector General revealed that the BOP granted compassionate release to only an average of 24 incarcerated people per year. *See* U.S. Dep’t of Just. Office of the Inspector General, *The Federal*

Step Act, Congress sought to mitigate this by “increasing the use and transparency of compassionate release.” Pub. L. 115-391, 132 Stat. 5194, 5239 (capitalization omitted).

Substantively, the First Step Act also modified the “extraordinary and compelling reasons” determination. Congress never defined what constitutes “extraordinary and compelling,” but rather delegated this determination to the Sentencing Commission.<sup>2</sup> By the text of § 3582(c)(1)(A), any sentence reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.” However, since passage of the First Step Act, the Sentencing Commission has not updated its guidelines on compassionate release.<sup>3</sup> This has created significant disagreement across the country whether the pre-First Step Act policy statement is still “applicable,” and thus binding on district courts.

The Fifth Circuit recently joined the Second, Fourth, Sixth, Seventh, and Tenth Circuits in concluding that § 1B1.13 is no longer binding on a district court. *See United States v. Shkambi*, 2021 WL 1291609, at \*4 (5th Cir. 2021) (“The district court on remand is bound only by § 3582(c)(1)(A)(i) and, as always, the sentencing factors in § 3553(a). In reaching this conclusion, we align with every circuit court to have addressed the issue.”). Under this new framework, § 1B1.13 still binds district courts on motions made by the BOP, but, for motions made directly by an inmate, district courts are free to consider any relevant fact in determining if “extraordinary and compelling reasons” exist. *See Brooker*, 976 F.3d at 235–36 (because the First Step Act allows

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*Bureau of Prisons’ Compassionate Release Program* 1 (2013), <https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf> (last visited April 14, 2020). And of the 208 people whose release requests were approved by both a warden and a BOP Regional Director, 13% died awaiting a final decision by the BOP Director. *Id.*; *see also Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 868 (2009) (noting that, in the 1990s, 0.01 percent of inmates annually were granted compassionate release).

<sup>2</sup> In 28 U.S.C. § 994(a)(2), Congress granted the Commission broad authority to promulgate “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in [18 U.S.C. § 3553(a)(2)].” And in 28 U.S.C. § 994(t), “Congress instructed the Commission to ‘describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.’” *United States v. Garcia*, 655 F.3d 426, 435 (5th Cir. 2011) (quoting 28 U.S.C. § 994(t)).

<sup>3</sup> The Sentencing Commission currently lacks a quorum to issue new guidelines.

both inmates and the BOP to file compassionate-release motions under § 3582(c)(1)(A), § 1B1.13 now applies only when such motions are made by the BOP and is inapplicable when a compassionate-release motion is made by a defendant); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020) (“A sentence reduction brought about by motion of a defendant, rather than the BOP, is not a reduction ‘under this policy statement.’”); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (agreeing with *Brooker* and holding that there is no “applicable” policy statement for § 3582(c)(1)(A) motions after the First Step Act); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020) (“Until the Sentencing Commission updates § 1B1.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an ‘extraordinary and compelling’ reason justifies compassionate release”).

Despite this newfound discretion, district courts are not without guidance in determining whether “extraordinary and compelling reasons” exist. First, Congress has explicitly limited that “[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason. 28 U.S.C. § 994(t) (emphasis added). Second, the Sentencing Commission’s policy statement and commentary is still persuasive. *United States v. Logan*, No. 97-CR-0099(3), 2021 WL 1221481 (D. Minn., Apr. 1, 2021) (finding that § 1B1.13’s definition of “extraordinary and compelling” should be afforded “substantial deference . . . as such deference is consistent with the intent (even if not mandated by the letter) of § 3582(c)(1)(A)”). Application Note 1 of the policy statement provides that “extraordinary and compelling reasons” exist when: (1) a terminal illness or other medical condition “substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility”; (2) a defendant, who is at least 65 years old, “is experiencing a serious deterioration in physical or mental health because of the aging process” and “has served at least 10 years or 75 percent of his or her term of imprisonment”; and

(3) a defendant has minor children without a caregiver or with an incapacitated spouse or partner who needs the defendant to be the caregiver. U.S.S.G. § 1B1.13, n.1(A)-(C). Lastly, BOP Program Statement 5050.50 (“PS 5050.50”), amended after passage of the First Step Act, describes the factors BOP considers grounds for compassionate release. *See* PS 5050.50 ¶¶ 3–6. These grounds are similar to the reasons identified by the Sentencing Commission, but also include a list of factors like rehabilitation and circumstances of the offense.<sup>4</sup> *Id.*

Building from this guidance, district courts across the country have identified additional situations where “extraordinary and compelling reasons” exist. First, while rehabilitation alone is not an “extraordinary and compelling” reason for a sentence reduction, it can be a significant factor warranting a sentence reduction when an inmate has an otherwise qualifying condition.<sup>5</sup> *See United States v. Rodriguez*, 451 F.Supp.3d 392, 405 (E.D. Pa. 2020) (noting that the Sentencing Commission itself interpreted § 3582(c)(1)(A) as allowing consideration of an inmate’s rehabilitation). If an inmate demonstrates a long, comprehensive record of rehabilitation, it goes to whether injustice would result if they remain incarcerated. *See Brooker*, 976 F.3d at 238 (identifying “the injustice of [a] lengthy sentence” as a factor that may weigh in favor of a sentence reduction). Second, courts consider any changes in law and the sentencing guidelines when determining if a sentence is extraordinary. For example, courts grant compassionate release at a remarkable rate for inmates subject to the now abolished § 924(c) sentence-stacking. *See McCoy*, 981 F.3d at 285 (“As the court observed in *Bryant*, multiple district courts have concluded that the

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<sup>4</sup> PS 5050.50’s nonexclusive factors are: “the defendant’s criminal and personal history, nature of his offense, disciplinary infractions, length of sentence and amount of time served, current age and age at the time of offense and sentencing, release plans, and ‘[w]hether release would minimize the severity of the offense.’” *United States v. Saldana*, 807 F. App’x 816, 819 (10th Cir. 2020) (quoting PS 5050.50 ¶ 7).

<sup>5</sup> 18 U.S.C. § 3142(g) aids the Court in determining whether a defendant is a danger to the community. Applicable factors include: “the nature and circumstances of the offense,” “the person’s character, physical and mental condition, family ties, employment, . . . criminal history,” and “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.” 18 U.S.C. § 3142(g).

severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an “extraordinary and compelling” reason for relief under § 3582(c)(1)(A)). Though Congress did not retroactively eliminate § 924(c) sentence-stacking, courts consider whether the outdated policy warrants relief on a case-by-case basis.<sup>6</sup>

Even if extraordinary and compelling reasons exist, they must outweigh the 18 U.S.C. § 3553(a) factors to warrant sentence reduction. *See* 18 U.S.C. § 3582(c)(1)(A). These factors are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and sentencing range [provided for in the U.S.S.G.] . . .
- (5) any pertinent [Sentencing Commission] policy statement . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

*Id.* § 3553(a).

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<sup>6</sup> *See* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 123–24 (2019) (arguing Congress did not make § 924(c) sentence stacking retroactive because it did not want to make all inmates “*categorically*” eligible for sentencing relief, but Congress meant for relief from draconian sentences to apply “*individually*”).

## DISCUSSION

Allison moves for a reduction in sentence based on underlying health conditions following his bout with skin cancer (Dkt. #401). Allison argues his medical conditions, coupled with the ongoing COVID-19 pandemic, warrant a sentence reduction. The Government argues that Allison's motion is not ripe for review, but, in any case, Allison has not shown "extraordinary and compelling reasons" exist (Dkt. #407).

Although Allison has met § 3582(c)(1)(A)'s exhaustion requirement, he has not met the statute's requirement that "extraordinary and compelling reasons" exist warranting a reduction of his sentence. Allison's motion, therefore, must be denied.

### **I. Allison Has Met Section 3582(c)(1)(A)'s Exhaustion Requirement.**

Allison's compassionate release motion may only be considered if he first meets § 3582(c)(1)(A)'s exhaustion requirement. Courts may not consider a modification to a defendant's sentence under § 3582(c)(1)(A)(i) unless a motion for such a modification is properly made by the Director of the BOP or by a defendant who has fully exhausted their administrative remedies. 18 U.S.C. § 3582(c)(1)(A). Fully exhausting administrative remedies requires a denial by the warden of a defendant's facility or waiting thirty days without receiving a response to a request.<sup>7</sup> *Id.*

Section 3582(c)(1)(A)'s exhaustion requirement is not waivable. *See United States v. Rivas*, 833 F. App'x 556, 558 (5th Cir. 2020) ("Because the statutory language is mandatory—that a prisoner must exhaust their BOP remedy before filing in district court—we must enforce this procedural rule . . ."); *United States v. Reeves*, No. 18-00294, 2020 WL 1816496, at \*2 (W.D. La.

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<sup>7</sup> BOP regulations define "warden" to include "the chief executive officer of . . . any federal penal or correctional institution or facility." 28 C.F.R. § 500.1(a); *United States v. Franco*, 973 F.3d 465, 468 (5th Cir. 2020); *c.f. United States v. Campagna*, 16 Cr. 78-01 (LGS), 2020 WL 1489829, at \*3 (S.D.N.Y. Mar. 27, 2020) (holding that "the denial of Defendant's request by the Residential Re-entry Manager suffices to exhaust his administrative rights").

Apr. 9, 2020) (“While the Court is well aware of the effects the Covid-19 pandemic . . . § 3582(c)(1)(A) does not provide this Court with the equitable authority to excuse Reeves’ failure to exhaust his administrative remedies or to waive the 30-day waiting period.”). If a defendant has not sought relief from the BOP, or has not waited thirty days since seeking relief, the Court may not consider their motion.

On October 14, 2021, Allison mailed a letter to the FCI Beaumont warden asking that he be granted a reduction in sentence. The warden has not responded. Allison filed his motion after more than 30 days had lapsed since the Warden received the certified mail. The Government argues that, because “the defendant has not yet reported to the facility,” he is “not an ‘inmate’ . . . for purposes of” the compassionate release statute (Dkt. #318 at p. 2). The Court notes, however, that § 3582 uses the term “defendant,” rather than “inmate.” Further, the Government cites to no—and the Court is unaware of—any case law holding that a criminal defendant sentenced to a specific term must have begun serving his or her term before requesting a reduction in sentence under § 3582. For these reasons, the Court finds Allison has met § 3582(c)(1)(A)’s exhaustion requirement despite his current, pre-detention status.

## **II. Allison Has Not Met Section 3582(c)(1)(A)’s Requirement that “Extraordinary and Compelling Reasons” Warrant a Sentence Reduction.**

Allison’s sentence reduction motion turns on his assertion that the risks to his health following his recent bout with cancer and the enhanced risks of serious infection from COVID-19 constitute extraordinary and compelling reasons to reduce his sentence. Allison’s assertion fails because his conditions are not severe enough to constitute “extraordinary and compelling reasons” under § 3582(c)(1)(A)(i).

The Court has discretion to decide whether Allison’s conditions present “extraordinary and compelling reasons” warranting a sentence reduction. *See Shkambi*, 2021 WL 1291609, at \*4. The



Court is not bound by the Sentencing Commission's policy statement and may consider any relevant facts in evaluating Allison's impending condition of incarceration. *Id.* Typically, courts consider whether a defendant suffers from a serious health condition, has a record of rehabilitation, the nature and circumstances of defendant's offense, and whether a sentence is based on outdated law. *See Brooker*, 976 F.3d at 238.

When considering whether a defendant's health condition supports compassionate release, the mere existence of COVID-19 in society cannot independently justify a sentence reduction. *See United States v. Miller*, No. 2:17-CR-015-D, 2020 WL 2514887, \*2 (N.D. Tex. May 15, 2020) (citing *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020)). For a defendant to be granted compassionate release based on COVID-19, defendant must have a serious comorbidity and evidence the facility is not effectively controlling the spread of the virus. *See United States v. Vasquez*, No. CR 2:18-1282-S-1, 2020 WL 3000709, at \*3 (S.D. Tex. June 2, 2020) ("General concerns about the spread of COVID-19 or the mere fear of contracting an illness in prison are insufficient grounds to establish the extraordinary and compelling reasons necessary to reduce a sentence.").

In the instant case, Allison fails to show his health conditions warrant compassionate release. Allison is not subject to a terminal illness. He is also only 43 years old. While he recently underwent two surgeries for skin cancer, the medical records indicate that the first surgery successfully removed the problematic lesion, and the subsequent surgery was performed to "preserve functional capabilities and to restore physical appearance" (Dkt. #314, Ex. C). Allison further indicates that, though his condition has improved, the cancer has weakened his immune system and renders him more susceptible to serious complications if he contracts COVID-19. However, as the Government notes, the records Allison provided only once reference to a

weakened immune system. The statement reads, “per patient he has a weakened immune system. No known condition as a cause” (Dkt. #314, Exhibit C). Allison provides no other information regarding the state of his immune system. Absent COVID-19, Allison would present no basis for compassionate release because his medical ailments are appropriately managed and do not impede his ability to provide self-care in the institution.

As for the risks associated with, COVID-19, Allison argues two points in favor of a reduced sentence. First, he highlights FCI Beaumont’s inability to prevent the spread of COVID-19 to its inmates given the crowded spaces and the current number of infected individuals associated with the facility. Second, he cites to case law in which courts across the country have granted compassionate release or reduced sentences for inmates battling cancer during the pandemic (Dkt. #314 at pp. 9–10). The Court addresses each point in turn.

FCI Beaumont is in compliance with the BOP’s strenuous plan of action to combat COVID-19. See [www.bop.gov/coronavirus](http://www.bop.gov/coronavirus). To date, the facility has not reported a single death related to COVID-19 and is offering vaccines to all inmates who consent to receiving it. The case law that Allison relies on in his motion predates the vaccine, which has greatly reduced the risk of serious illness in death for those who receive it. The Court is unaware of Allison’s vaccination status. If he has not received the vaccine, he will have the opportunity to receive the proper dosage upon his reporting to FCI Beaumont, where the facility has continued responding to the ever-evolving COVID-19 pandemic and made changes to its operations as needed (Dkt. #318 at p. 4).

Further, in many of the cases Allison cites, the defendants experienced drastically more severe health conditions. For example, in the single citation to a case from a court in this circuit, the defendant was a 70-year-old man with Stage IV metastatic prostate cancer that had spread to his spine, pelvis, and lower ribs. *United States v. Heitman*, No. 3:95-CR-0160(4)-G, 2020 WL

3163188, at \*1 (N.D. Tex. June 12, 2020). The Court recognizes that a diagnosis of any type of cancer is concerning and should be taken seriously, particularly while the world does not yet fully understand COVID-19; but the Court must also acknowledge that Allison’s current condition does not rise to the level of “extraordinary and compelling.” Accordingly, Allison has not presented evidence demonstrating a serious risk to his health.

Weighing the evidence, Allison has not shown that his incarceration is “extraordinary and compelling” under the § 3582(c)(1)(A)(i) framework. *See United States v. Stowe*, No. CR H-11-803(2), 2019 WL 4673725, at \*2 (S.D. Tex. Sept. 25, 2019) (citation omitted) (stating that the defendant generally “has the burden to show circumstances meeting the test for compassionate release”).<sup>8</sup>

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Under the rule of finality, federal courts may not “modify a term of imprisonment once it has been imposed” unless one of a few “narrow exceptions” applies. *Freeman v. United States*, 564 U.S. 522, 526 (2011) (citing 18 U.S.C. § 3582(c)) (plurality op.); *see also Dillon*, 560 U.S. at 819 (same). Compassionate release is one of those exceptions, but a defendant must conform both to the procedural and substantive requirements of § 3582(c)(1)(A) for a court to modify a sentence. Because Allison has not met the controlling requirements for compassionate release set forth in § 3582(c)(1)(A)(i), his motion must be denied.<sup>9</sup>

### CONCLUSION

It is therefore **ORDERED** that Defendant Michael Luke Allison’s Motion for Expedited

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<sup>8</sup> Given Defendant’s failure to meet § 3582(c)(1)(A)’s requirements, the Court need not address whether the applicable 18 U.S.C. § 3553(a) factors support a sentence reduction.

<sup>9</sup> In the alternative, the Court is also unable to order home confinement. The BOP has exclusive authority to determine where a prisoner is housed; thus, the Court is without authority to order home confinement. 18 U.S.C. § 3621(b); *see also United States v. Miller*, No. 2:17-CR-015-D (02), 2020 WL 2514887, at \*1 (N.D. Tex. May 15, 2020) (“[N]either the CARES Act nor the First Step Act authorizes the court to release an inmate to home confinement.”).

Relief and Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A), As Amended by the First Step Act (Dkt. #314) is **DENIED**.

**SIGNED this 4th day of January, 2022.**

  
AMOS L. MAZZANT  
UNITED STATES DISTRICT JUDGE